

2009 WL 8486261 (Hawai'i Cir.Ct.) (Trial Motion, Memorandum and Affidavit)

Circuit Court of Hawai'i.

Honolulu County

Tsutae IWAMOTO,

v.

Glenn T. HIRONAGA, et al.

No. 1CC071243012.

November 2, 2009.

Hearing

Date: November 10, 2009

Time: 3:00 p.m.

Plaintiff Tsutae Iwamoto's Memorandum in Opposition to Defendants Helen Bench Realty, Charles Bench and Yu Neu Bench's Motion for Partial Summary Judgment; Filed October 9, 2009; Declaration of Thomas E. Bush; Declaration Tsutae Iwamoto; Declaration of Quentin Chun; Exhibits "1" - "41"; Certificate of Service

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Judge: [Gary W.B. Chang](#).

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**PLAINTIFF TSUTAE IWAMOTO'S MEMORANDUM IN OPPOSITION TO
DEFENDANTS HELEN BENCH REALTY, CHARLES BENCH AND YU NEU BENCH'S
MOTION FOR PARTIAL SUMMARY JUDGMENT; FILED OCTOBER 9, 2009**

The Bench Defendants are not entitled to summary judgment. They acted as Plaintiff Tsutae Iwamoto's realtors for the sale of 92-267 Hoalii Place to Ana Torres and indisputably owed her fiduciary obligations of the utmost good faith, integrity, honesty and loyalty, as well as duty of due care and diligence. However, they completely abandoned their duties to her. Instead, as they also were creditors with adverse interests to her, they sacrificed her best interests and made sure that the sale closed in a fashion that protected their profit while exposing her to a loss of over \$600,000.

I. FACTS

A. Mrs. Iwamoto Is Befriended by Hironaga.

Mrs. Iwamoto is 76 years old. She has basically been a housewife, and has no real business experience. She has never driven a car. She graduated from Pahoa High Scholl on the Big Island in 1951 and has no other education. She has lived at her home, 3689 Manoa Road in Honolulu, Hawaii, since her first husband purchased the home with her in approximately 1965, except in the 1980's when she lived for a time in a townhome in Kaneohe. *See* T. Iwamoto Decl. at ¶ 2. In 1993, her youngest son, Murray, tried to commit suicide by hanging himself after a failed romantic relationship. As a result, he became completely mentally disabled and, since the incident, requires 24-hour assistance, seven days a week. Mrs. Iwamoto has taken care of her son since 1993 at her Manoa Property. *Id.* at ¶ 3.

Murray's care is a full-time occupation. He is 43 years old and approximately five feet eight inches, 220 pounds. Mrs. Iwamoto is approximately four feet eleven inches and 120 pounds. *Id.* at ¶ 4. Murray can walk, but he cannot cook, bathe or dress himself. He does not know when he needs to void his bladder or defecate, and needs assistance in basic hygiene. Mrs. Iwamoto must keep track of the last time Murray used the toilet to know when to bring him next to urinate or defecate. Attached hereto as Exhibit 1 is a short video, which shows the Manoa home and some of the care activities that Mrs. Iwamoto must perform for Murray on a daily basis. While Mrs. Iwamoto has other adult children, she has to varying degrees been estranged from those children whom she believes do not properly treat Murray. This has been a constant source of heartache and stress for her. *See* T. Iwamoto Decl. at ¶ 6. She lives on a fixed income with her sole source of income being social security that she and Murray receive. *Id.*

It was in this vulnerable situation that Glenn Hironaga appeared at Mrs. Iwamoto's door in 2002, soliciting work as a handyman/contractor. *Id.* at ¶ 7. As it turned out, she did have repairs to her property that needed to be done. She was impressed with Hironaga who told her that he was doing work in the neighborhood and recounted a story in which he had been redoing an elderly man's library and had found thousands of dollars in bills stuffed in between books in bookcases and had returned them to the gentleman. *Id.*

She hired him to do some work. He took out a koi pond and waterfall on the front of her house that had been a constant concern for her as neighborhood children would play in the pond and she always had a worry that someone would get hurt. *Id.* at ¶ 8 and Ex. 1. He leveled the ground and, using heavy equipment, placed boulders around the house, which sits on the corner of an intersection. *Id.* He also put in a sidewalk around part of the house, which was completed in December 2002. *Id.* While he was doing this work, he ingratiated himself with Mrs. Iwamoto, leading her to believe that he was a contractor. *See* T. Iwamoto Decl. at ¶ 9. (In fact, DCCA records show that his contractor's license was revoked on July 24, 2001, that he was fined \$5,000 and ordered to pay \$52,047.61 in restitution in a settlement and order relating to six (6) complaints, including complaints for “engaging in dishonest, fraudulent or deceitful acts”, “practicing beyond scope of license”, “failure to complete on time” and “failure to provide estimate or written estimate/contract.” *See* Ex. 2).

B. Hironaga Gets Iwamoto to Transfer Title to Her Home and Drains Her Bank Account.

While doing work for Iwamoto, Hironaga suggested to her that she could make money by investing in the development of property in Makakilo that he could build for her, and then it could be sold for a profit. At first she thought he was kidding, but he kept repeating his proposal. See T. Iwamoto Decl. at ¶10. Mrs. Iwamoto found this attractive because she had always been concerned about caring for Murray, especially about who would care for him when she no longer could. *Id.* Given her limited income, this appeared to her to be a heaven sent opportunity to make money “to put Murray in a better place.” *Id.*

At Hironaga's urging, in 2003 Mrs. Iwamoto applied for a VISA card -- she had never had one before -- that Hironaga could use, and liquidated her sole source of retirement money: \$26,000 in an IRA. *See* Exs. 3 and 4. She understood that he would need these funds to get the Makikilo property and build on it. *See* T. Iwamoto Decl. at ¶ 11. In addition, Hironaga drove her (and Murray) downtown and brought her to a building in what he informed her was an attempt to get refinancing on her behalf for the Manoa property so that money could be used for the Makakilo property. However, Hironaga later informed her that she did not qualify and suggested that to allow him to make further credit applications on her behalf that she give him a power of attorney. *Id.* at 1 14. She agreed as it was difficult for her to travel, given that she did not drive and could not leave Murray. Accordingly, she signed a power of attorney that Hironaga presented to her, with the understanding that she expressed to him - that it was to be used to allow him to make credit applications on her behalf. *Id.* She did not keep a copy of the power of attorney. *Id.*

Thereafter, Hironaga informed her that she would need a co-signer to borrow money given her limited income but not to worry as he had it all worked out. *Id.* at 1 15. Accordingly, he took her (and Murray) to an office downtown to sign documents that she understood would be needed to get a loan. When she got to the office, she learned for the first time that the co-signer was Donald Tanida. *Id.* She recalls signing many documents at that time, but did not read the documents and did not recall the documents being explained to her. *Id.* She certainly did not understand and did not intend to “sell” her home to Tanida. *Id.* Rather, Hironaga assured her that everything was fine. *Id.* She kept no copies of any documents she had signed on that date; rather, Hironaga kept all copies. *Id.*

Escrow records show that, in fact, Mrs. Iwamoto purportedly “sold” her home to Donald Tanida for \$500,000 in a closing that occurred on May 6, 2003. Tanida supposedly paid the \$500,000 by paying \$50,000 in cash, getting a \$350,000 loan from New Century Mortgage Corporation and giving Mrs. Iwamoto a \$100,000 purchase money mortgage. *See* Ex. 5. In fact, this arrangement was a shibbai. Tanida, in his deposition, while repeatedly swearing at Mrs. Iwamoto's attorney, admitted that he never really intended to buy or own the property. He claimed that he was simply doing a favor for Mrs. Iwamoto and her “retarded son” at the request of Mrs. Iwamoto and Hironaga. *See* Ex. 6, Tanida depo at 19:3-20:20; 52:25-53:10.

Mrs. Iwamoto denies that she asked Tanida to participate in a sham sale and, in fact, she was unaware that this is how the transaction was structured. *See* T. Iwamoto Decl. at ¶ 16. She does recall, however, that Tanida later spoke to her and admitted that he had been paid \$5,000 by Hironaga for his assistance. *Id.* This admission is confirmed by Tanida's bank account records, which show that the day after the closing of the sham sale of the Manoa property, Hironaga paid him \$5,000 (money, which he claims he “borrowed” from Hironaga, though he has never paid it back). *See* Ex. 7 (Tanida Bank Account Records) and Ex. 6, Tanida depo at 24:19-25:21.

Indeed, immediately upon the closing of the supposed “sale” of Mrs. Iwamoto's Manoa home to Tanida, Hironaga, misusing the power of attorney he had obtained from Mrs. Iwamoto, invaded her credit union account (into which the New Century loan proceeds had been paid), and wrote out at least \$169,799.26 in checks to himself and others (including Tanida's \$5,000). Mrs. Iwamoto was unaware of this activity in her account. Attached below is a schedule of checks written by Hironaga from Mrs. Iwamoto's account:

SUMMARY OF BANK DISBURSEMENTS

DATE	CHECK NO./WIRE TRANSFER	PAYEE	AMOUNT
05/06/03	074029	Tom Villaire	\$30,000.00
05/06/03	074030	Glenn T. Hironaga	\$9,000.00
05/07/03	074070	John Cowden	\$6,000.00
05/07/03	074071	Glenn T. Hironaga	\$9,000.00
05/07/03	074069	Donald Tanida	\$5,000.00
05/13/03	074227	Glenn T. Hironaga	\$9,000.00
05/02/03	23040	Nancy McDevitt	\$30,000.00
05/16/03	074374	George Nekota	\$10,000.00
05/20/03	074470	New Century Mortgage	\$2,299.26
05/20/03	074469	Glenn T. Hironaga	\$5000.00
05/23/03	074597	Randy Hirata	\$6,000.00
05/23/03	074598	Glenn T. Hironaga	\$5,000.00
05/27/03	074658	Glenn T. Hironaga	\$6,000.00
06/02/03	074878	Glenn T. Hironaga	\$6,000.00
06/12/03	075198	New Century Mortgage	\$2,500.00
06/12/03	075199	Glenn T. Hironaga	\$6,000.00
06/18/03	075437	Glenn T. Hironaga	\$6,000.00
06/26/03	075634	Glenn T. Hironaga	\$6,000.00
06/30/03	075790	Glenn T. Hironaga	\$5,000.00
07/08/03	076114	Glenn T. Hironaga	\$6,000.00
			\$169,799.26

See Ex. 8. ¹ Mrs. Iwamoto was unaware both that the money had been placed in her account and that Hironaga was withdrawing it. See T. Iwamoto Decl. at I 17.

C. Iwamoto Buys the Hoalii Place Property.

On or about May 18, 2003, Hironaga contacted Mrs. Iwamoto and told her that he had found the investment property they had discussed. That same day, he drove Mrs. Iwamoto and Murray to the offices of Vernco Properties, Inc. There, Mrs. Iwamoto signed a sales contract to buy Lot 77 of the Kumulani Subdivision, which had a street address of 92-267 Hoalii Place (“Hoalii

Place Property”). At that time, Mrs. Iwamoto met Helen² and Charles Bench, but they did not inform her that they were her realtors or that they were getting paid a commission from the closing of this property. T. Iwamoto Decl. at ¶ 18. Indeed, she only understood that they were somehow connected to Hironaga. *Id.*

In fact, in addition to being real estate brokers, the Benches are sophisticated real estate speculators, with a portfolio of over 20 investment properties that they currently own. See Ex 9a (listing 20 of their properties).

In his deposition, Charles Bench confirmed that he and his wife never met Mrs. Iwamoto prior to seeing her at Vernco Properties and that their prior contact was with Hironaga. See Ex. 10, C. Bench depo at 22:16-24:10. He also admitted that he did not know the relationship between Hironaga and Mrs. Iwamoto but thought they were friends. *Id.* at 24:11-25:22. He thus admitted that although he stated in the contract that he had accompanied her to inspect the lot being purchased that his statement was false. *Id.* at 28:14-29:18.³ Meanwhile, the Benches admitted that they did not go over the contract with Mrs. Iwamoto, including the cooperating broker's agreement whereby they received a commission of \$5*700. *Id.* at 30:8-23; Ex. 11, H. Bench depo at 58:11-60:10.⁴

D. The Benches Prepare a False Mortgage and Become Mrs. Iwamoto's Creditors.

In March 2004, the Benches had a mortgage drafted in favor of Helen Bench Realty that they, using Hironaga as the intermediary, had Mrs. Iwamoto sign. See Ex. 12. The mortgage is a *false* document, however, insofar as it refers to a \$60,000 note supposedly signed by Mrs. Iwamoto, acknowledging that she owes \$60,000 plus interest. In fact, there is no such note. When questioned in her deposition on this point, Helen Bench stated that a \$10,000 “receipt and promise to pay note” drafted by her husband was the note referred to by the mortgage. See Ex. 11, H. Bench depo at 82:18-85:19.⁵ Mrs. Iwamoto denies that the Benches ever spoke with her to inform her that they were lending money to Hironaga on her behalf or spoke with her about the mortgage they were seeking. See T. Iwamoto Decl. at ¶ 18.

Nonetheless, the Benches -- who acknowledged that Mrs. Iwamoto was her client during this time (see Ex. 11, H. Bench depo at 68:16-25) -- claim that the \$60,000 supposedly secured by this mortgage was needed for work on 92-267 Hoalii Place. There is no evidence to show that any of this money was for Hoalii Place.⁶ Department of Planning & Permit (“DPP”) records show that contractor for any building on Hoalii Place was changed in December 2003 from “owner/builder” to “Y.S. Construction, Inc.” See Ex. 9. The Benches undoubtedly were aware of this fact as they were simultaneously using Y.S. Construction to build on their own nearby property at the Kumulani subdivision (located at 92-1395 Hoalii Street). See Ex. 15.⁷ Moreover, at this same time, the Benches knew that Hironaga had a relationship with Todd Lemkau, who had taken title to other property in the Kumalani subdivision located at 92-1375 Kuamu Street. See Ex. 11, H. Bench depo at 70:25-72:18. In fact the Benches met Lemkau through Hironaga and represented Lemkau in his *March 2004 purchase* of 92-1375 Kuamu Street, which *Lemkau and Hironaga would jointly own*, through their company H&L Developments, Inc. See Exs 16 & 17 and Ex. 11, H. Bench depo at 31:11-32:17.⁸

E. The Benches Give Hironaga More Money, then Get a Listing Agreement from Hironaga When the Money is Not Repaid and Prepare a Second False Mortgage.

On April 21, 2004, the Benches gave Hironaga another \$20,000, in return for which he (individually and without reference to Mrs. Iwamoto) apparently promised to pay them back by May 3, 2004 or “arrange” for a second mortgage on 92-267 Hoalii Place. See Ex. 19. Hironaga apparently did not pay back the money by May 3, 2004. Instead, the Benches have produced from their files a May 12, 2009 listing agreement allowing them to sell the Hoalii Place property, ostensibly signed Hironaga as “attorney in fact Tsutae Iwamoto”. See Ex. 20. Mrs. Iwamoto knew nothing about this listing agreement, and was never advised by the Benches that they would be representing her in selling the property. See T. Iwamoto Decl. at ¶21.

In fact, the Benches -with their listing agreement in hand -- proceeded to give Hironaga more money, another check for \$24,500 on May 21, 2009, for which they prepared a "Promissory Note" that Hironaga signed, in which *he* (individually and with no reference to Mrs. Iwamoto) promised to pay the Benches \$25,000 "to be converted to a second mortgage at 92-267 Hoalii P. Once this mortgage is recorded this promissory note will be replaced by the mortgage note." *See* Ex. 21. Mrs. Iwamoto was not contacted by the Benches regarding this matter and knew nothing about it. *See* T. Iwamoto Decl. at ¶2.

On that same date, the Benches prepared a second mortgage, which they gave to Hironaga, stating that Mrs. Iwamoto had signed a May 21, 2004 promissory note to pay Mr. and Mrs. Bench \$65,000 plus interest. *See* Ex. 22. This mortgage is also *false* as Mrs. Iwamoto never signed a \$65,000 promissory note. While Mrs. Iwamoto acknowledges her signature on the mortgage, she does not recall signing this document and was unaware that she was supposedly agreeing to repay with interest a \$65,000 loan from the Benches. *See* T. Iwamoto Decl. at ¶ 23.⁹

Again, there is no proof that any of the additional funds given to Hironaga were used for the Hoalii Place property, as opposed to the Kuamu property that Hironaga had (or would soon have) an interest in, or for any other purpose. In his deposition, Charles Bench explained that he gave Hironaga additional money after the first \$60,000 because "I was up to my neck already" as a result of having previously lent money. *See* Ex. 10, C. Bench depo at 53:20-54:10. Thus, he loaned the money without asking for any documentation as to why the money was needed or what it would be used for. *Id.* at 54:11-55:5.

F. The Benches Accept a Forged DROA and Seller's Disclosure Statement from Hironaga to Sell 92-267 Hoalii Place.

In September 2004, the Benches received an offer to purchase the Hoalii Place property for \$1,100,000 from a third party. *See* Ex. 24 at S00107. The Benches brought that offer to Hironaga, and ended up submitting a counter offer for \$1,200,000. *See* Ex. 25. Mrs. Iwamoto's signature was forged on this Counter-offer. *See* T. Iwamoto Decl. at ¶ 24. Indeed, her initials are even misspelled ("SI" instead of "TI"). *See* Ex. 25 at S000016-17. In their deposition, the Bench defendants maintain that they believed Mrs. Iwamoto had signed the counteroffer and that they were unaware of this forgery. *See* Ex. 11, H. Bench depo at 150:19-151:7. However, this testimony is unbelievable.

The original offer was submitted on September 15. *See* Ex. 24 at S00106. Mrs. Bench admits that she never saw Mrs. Iwamoto and did not give her a copy of the offer. Instead, she gave a copy to Hironaga on September 16th, and claims that on September 17th, she went over a counter offer with Hironaga, after which she got back as signed counter offer from Hironaga with what she claims she thought was Mrs. Iwamoto's signature and initials. *See* Ex. 11, H. Bench depo at 153:16-154:9. However, her letter submitting the counteroffer to the buyer's realtor (Felix) is dated September 16th, when she admits she initially met with Hironaga regarding the offer. *See* Ex. 25 at S00010. Indeed, even the forged counteroffer is dated September 16th. *Id.* at S00016-17. Circumstantial evidence clearly suggests that the Benches were present and collaborated with Hironaga on September 16th when Mrs. Iwamoto's signature was forged.

After submitting a counter offer, the Benches received a counter to the counter offer from the buyer, offering to pay \$1,150,000. *See* Ex. 24 at S00120-21. This offer was accepted by the seller apparently on September 18, 2004, with Mrs. Iwamoto's signature again forged and her initials misspelled. *Id.* The Benches continued to claim that they were unaware that Mrs. Iwamoto had not signed and, instead, gave the counter to the counter offer to Hironaga to get Mrs. Iwamoto's signature. Ex. 11 H. Bench depo at 166:15-169:4. In fact, Mrs. Iwamoto is clear that she was never informed about the offer, counter offer or counter to the counter offer. *See* T. Iwamoto Decl. at ¶ 24.

Further, on the same date that Mrs. Iwamoto's initials and signature was forged for the counter to the counteroffer, the Benches also obtained a forged seller's disclosure statement. This disclosure statement -- which states that it "**MUST be completed by Seller Only**" (emphasis in original), again bears the incorrect initials of "SI" for Mrs. Iwamoto on each page as well a forgery of her name. *See* Ex. 26. In her deposition, Helen Bench claims that she thought the incorrect initials and signature were by

Mrs. Iwamoto and that she continued not to notice that the initials were incorrect. *See* Ex. 11, H. Bench depo at 171:10-173:1. She testified that she gave it to Hironaga and got it back from him. *Id.* at 174:14-175:4. Again, Mrs. Iwamoto had no knowledge about this disclosure statement. *See* T. Iwamoto Decl. at ¶ 24.

G. The Benches Give Hironaga \$60,000 and Then Instruct Escrow to Close the Transaction, Allowing over \$250,000 to be Shifted from the Seller's Proceeds to Themselves and Others.

As set forth in the accepted sales contract, escrow was scheduled to close on November 19, 2004. *See* Ex. 24 at S00108. However, on October 20, 2004, the Benches had Hironaga sign a new “Promissory Note” which Charles Bench drafted by which Hironaga promised to pay Mr. Bench \$50,000 through escrow at closing, however, if escrow was going to be delayed or canceled, Hironaga promised to secure the note *by a mortgage on the Kuamu Propert* which at the time was owned by Todd Lemkau. *See* Ex. 27. To support this note, the Benches provided evidence of \$45,000 in checks they had written to Hironaga.

In deciding to loan this money, Mrs. Bench stated that Hironaga told her that he needed it to complete punch list items for the Hoalii Place property, however, she asked for no proof of this because as she frankly admitted, “*we already loan him so much already we got no choice.*” *See* Ex. 11, H. Bench depo at 182:18-183:12 (emphasis added).

As to why Hironaga would be offering to secure the payment of \$50,000 with a mortgage on the Kuamu property -- which Mrs. Iwamoto had no interest in -- Mr. Bench, who drafted the promissory note, stated that this caused him no concern because “I wanted to be covered because I don't make a lot of money and I was beginning to get nervous about where it was going to come back from.” *See* Ex. 10, C. Bench depo at 96:14-97:7.

Indeed, the Benches were clearly concerned to close this transaction so they would get paid. Thus, on November 1, 2004, Helen Bench telephoned escrow to inform them that the seller wanted to sign closing documents that week. *See* Q. Chun Decl. at ¶ 6. In fact, Mrs. Iwamoto had made no such request. *See* T. Iwamoto Decl. at ¶ 25. Instead, she was contacted by Hironaga who told her that the property was sold and that she needed to sign documents. He also told her that Helen Bench had been very nice to lend money for the property. He did not provide any specifics. *Id.*

In fact, on November 5, 2004, Mrs. Iwamoto --accompanied by Helen Bench --came to the escrow office and signed closing documents. *See* Q. Chun Decl. at ¶ 7. Among the closing documents that Mrs. Iwamoto signed was an “Estimated Settlement Statement”. *See* Ex. 28. This statement showed that after all deductions, the seller would be receiving cash of \$627,761.58. *Id.* at 168, line 603. Included in the deductions were payments of \$60,000, \$65,000 and \$50,000 to the Benches. *Id.* at 168, lines 504-505 and 169.

Also included were payoffs of “existing loans” of \$93,000 and \$188,000. *Id.* at 168, lines 506-507. These “existing loans” referred to mortgages that Hironaga -- without informing Mrs. Iwamoto -- had used his power of attorney to give to Edward Murphy (\$93,000) and Mary Drader (\$188,000) in July 2004. *See* Exs 29 & 30. Both individuals were mainland associates of **Todd Lemkau**, with Murphy having lent Lemkau money! *See* Ex. 31, K. Lemkau depo at 30:22-32:3 and 35:15-36:9.¹⁰ Helen Bench admits that she was aware of these loans as a result of receiving and reviewing a preliminary title report ordered by escrow prior to closing. *See* Ex. 11, H. Bench depo at 143:13-145:3. However, while she claims she called Mrs. Iwamoto to inform her about these mortgages, Mrs. Iwamoto disputes this. Mrs. Iwamoto had no understanding that Murphy and Drader provided money that was used for the Hoalii Place property. *See* T. Iwamoto Decl. at ¶ 26.

After November 5, 2009, the closing had to be extended because of an issue regarding the buyer's lender. *See* Q. Chun Decl. at ¶ 12. However, the Benches instructed escrow -- without informing Mrs. Iwamoto -- that the seller would agree to give an extension only to December 1, 2004 and no longer, and that if the closing did not record on December 1, 2004, the seller would cancel the transaction. *See* Q. Chun Decl. at ¶ 13 and T. Iwamoto Decl. at ¶ 27.

On November 26, 2009, Helen Bench telephoned escrow to inform it that the Benches would get an additional \$10,000 from the seller's proceeds upon closing. However, escrow wanted written authorization. *See* Q. Chun Decl. at ¶ 11. Without consulting Mrs. Iwamoto or even copying her on correspondence, Charles Bench wrote a letter on November 30, 2009, authorizing escrow to deduct \$10,000 from the seller's proceeds and pay this to Bench Mark Realty. *Id.*, Ex. 32. ¹¹ The Bench Defendants claim that they provided this money to Hironaga for the property, but there is no proof and, again, Mrs. Iwamoto states that she was never informed of this. *See* Ex. 10, C. Bench depo at 101:4-102:11 and T. Iwamoto Decl. at ¶ 28. In fact, Mr. Bench admitted that he felt compelled to give Hironaga the money he wanted “[b]ecause I was already this far in. I didn't want to not close for \$10,000 if I could help.” *See* Ex. 10, C. Bench depo at 102:12-14.

Also on November 30, 2004, escrow made available to the Benches, a copy of the Final Settlement Statement. *See* Q. Chun Decl. at ¶14 and Ex. 33. The Final Settlement Statement set forth the payoff amounts that had been provided to escrow by the Benches, Mary Drader and Edward Murphy. *Id.* In this Final Settlement Statement, escrow noted disbursements to the Benches, Drader and Murphy that were far different than what had been shown on the Estimated Settlement Statement signed by Mrs. Iwamoto on November 5th. The differences are as follows:

Estimated (ex.28)	Final (ex.33)	Payee
\$60,000	\$62,819.18	Helen Bench Realty
\$65,000	\$68,054.11	Charles and Yu Neu Bench
\$93,000	\$207,000.00	Edward Murphy
\$188,000	\$312,000.00	Mary Drader
\$0	\$10,000.00	Charles and Yu Neu Bench

Primarily as a result of these differences, the payoff to the seller *decreased from \$627,761.58 to \$373,823.19; a difference of \$253,938.39.*

On December 1, 2004, the next day after the Final Settlement Statement had been made available only to the Benches, Helen Bench telephoned escrow and instructed it to record the closing. *See* Q. Chun Decl. at ¶ 16. The following day, the Benches instructed escrow to distribute the proceeds in accord with the Final Settlement Statement. *Id.* at ¶ 17. Based on records from the Benches files, it appears that the earliest they could have viewed the Final Settlement Statement was December 1, 2004 or December 2, 2004. *See* Ex. 33.

Mrs. Iwamoto is adamant that she received no communications from the Benches or anyone else regarding a decrease of over \$250,000 in the seller's proceeds. *See* T. Iwamoto Decl. at ¶ 29. While the Benches may claim that they spoke with her about this, that never happened, and there is nothing in writing indicating that it was brought to Mrs. Iwamoto's attention before the money was disbursed that the seller's proceeds would be decreased by such a large amount, with the money going to the Benches, Murphy and Drader. ¹² *See* T. Iwamoto Decl. at ¶ 30.

II. ARGUMENT

The Fourth Amended Complaint asserts causes of action against the Bench Defendants for Negligence (Count XI), Breach of Fiduciary Duties (Count XII) and Unjust Enrichment (Count XIII). In representing Mrs. Iwamoto, the Benches failed to properly represent and protect her interests, no doubt because of their own conflict with ensuring that they got paid for whatever money they had given to Hironaga.

A. Glenn Hironaga's Declaration Should Not Be Considered, or at a minimum, the Motion Should Be Continued Until He Is Deposed.

While Hironaga defaulted in this litigation, he appeared at the September 9, 2009 court-ordered settlement conference in this matter. At that time, he agreed with Plaintiffs counsel to give a deposition on September 16, 2009. *See* T. Bush Decl. at ¶ 35. However, on September 15, 2009, he had a messenger deliver a note that stated he was not feeling well and would not be able to be deposed. *See* Ex. 34. Upon receiving this note, Plaintiffs counsel immediately telephoned Hironaga at the number Hironaga had provided at the settlement conference and left a message asking about his deposition. *See* T. Bush Decl. at ¶ 35. Hironaga never called back. Plaintiffs counsel thus re-set the deposition for October 1, 2009, and attempted to have Hironaga subpoenaed. *Id.* at ¶ 36. The Sheriff's Office made five (5) unsuccessful attempts to serve the subpoena. *See* Ex. 35.

It was thus with great surprise that Plaintiffs counsel received the Benches' Summary Judgment Motion on October 12, 2009 and noted that it included a declaration from Hironaga dated October 9, 2009. Meanwhile, as this Court knows, Hironaga obtained counsel who filed an October 8, 2009 motion to set aside the entry of default. Thus, on October 12th, Plaintiffs counsel sent Hironaga's counsel an email, informing him of the prior attempts to depose Hironaga and asking that Hironaga agree to be deposed that Friday. *See* Ex. 36. Hironaga's counsel responded by stating that he was not authorized to accept service for Hironaga and asking that Plaintiffs counsel wait until October 23, 2009. *Id.* In fact, Plaintiffs counsel thereafter attempted to have Hironaga subpoenaed for a deposition on October 17, 2009, but the Sheriff's Office was unsuccessful in serving the subpoena despite multiple attempts. *See* Ex. 37. Thereafter, on October 23, 2009, Plaintiffs counsel spoke with Hironaga's counsel about his client needing to be deposed given Hironaga's declaration. However, Hironaga's counsel could not commit to any deposition. *See* T. Bush Decl. at ¶ 37.

Under [HRCF Rule 56\(f\)](#) and basic fairness, when a party is precluded or unable to obtain testimony to oppose summary judgment, judgment cannot be entered against that party. *See* [Makanui v. Department of Education](#), 6 Haw. App. 397, 402, 721 P.2d 165, 169 (1986) (where protective order prevented plaintiff from deposing relevant witnesses, summary judgment could not be granted). That is the situation here. Hironaga has purposefully avoided Plaintiffs efforts to take his deposition, yet has submitted a self-serving declaration for use by the Bench Defendants. Under these circumstances, Hironaga's declaration cannot be used as evidence against Plaintiff and this motion should either be denied or continued until Hironaga allows himself to be deposed.

B. The Benches Were Negligent In Breaching Their Duty of Care Owed to Mrs. Iwamoto.

The Benches do not dispute that Mrs. Iwamoto was the actual owner of 92-267 Hoalii Place and that they acted as her realtors in both the purchase and sale of the property. Hawaii law imposes a duty of due care on the Benches. [Property House, Inc. v. Kelley](#), 68 Haw. 371, 377, 715 P.2d 805, 810 (1986). This duty included the duty to act in Plaintiff's best interests and to make full, fair and timely disclosure of all facts which are or which might be material to a transaction and which might affect Plaintiff's rights and interests or influence her actions. *Id.*

In Count XI, Plaintiffs alleged that this duty was violated by, **among other things**, failing to inform Plaintiff that she was the legal owner of the property, ensuring that she received the seller's proceeds from the sale, and placing mortgages on the property. The Bench Defendants seek summary judgment by narrowly construing their duties of full, fair and timely disclosure. In fact, the Benches utterly failed to ensure that Mrs. Iwamoto understood the material facts to the transaction

They apparently claim that they relied on Hironaga to act for her based on the power of attorney, but such reliance is misplaced. As Plaintiffs expert has pointed out, it is not an acceptable practice for realtors to simply accept an unlimited power of attorney, without reviewing that power with the principal, especially when the principal is readily available. *See* Ex. 37, K. Chong report. Here, Mrs. Iwamoto resided at her Manoa home the entire time the Benches represented her, yet not one time did they make

any effort to review the power of attorney with her to confirm her intent to allow Hironaga to use it for all purposes with respect to the Hoalii Place property. If they had done so, they would have learned that Mrs. Iwamoto understood that the document was intended to allow Hironaga to make credit applications on her behalf and had nothing to do with Hoalii Place. *See* T. Iwamoto Decl. at ¶ 14.

Moreover, the Benches' own actions belie their reliance on the Power of Attorney. They gave the offer, counter offer and counter counter offer to Hironaga to give to Mrs. Iwamoto to sign. Thus, they did not intend to deal only with Hironaga and his power of attorney. But it is a fundamental duty of a seller's realtor and standard practice to review the contracts with the seller. *See* Ex. 37 at pp. 6-7. Here, Mrs. Iwamoto has testified that the Benches never contacted her. Instead, the Benches accepted obviously forged documents that were so poorly done they even had the wrong initials.¹³

The “elephant in the room” that the Benches studiously avoid is why at any point in time they did not simply meet with Mrs. Iwamoto and review documents with her.¹⁴ The explanation is provided by the Benches themselves: once they gave Hironaga money, they were on the hook as creditors. To get repaid, they needed the property sold. They repeatedly acknowledged in their depositions that they wanted to get paid for money they gave Hironaga and that they knew it would not be paid until and unless there was a closing. Thus, the Benches took all steps in their power to wrap up the closing as soon as possible regardless of whether their principal's interests were protected. Examples of their haste to close include:

- (a) calling escrow on November 1, 2004 to have their client sign closing documents on November 5, 2004, even though the scheduled closing date was not until November 19, 2004 and even though no settlement statement had even been prepared.
- (b) accompanying Mrs. Iwamoto to the November 5, 2004 signing without explaining to her what she was signing or informing her about and clarifying the \$188,000 Drader and \$93,000 Murphy mortgages.
- (c) when notified that the buyer needed an extension, instructing escrow to set December 1, 2004 as a drop dead recording date, though Mrs. Iwamoto had no need for such a deadline;
- (d) on December 1, 2004, ordering escrow to record the transaction even though only that day had they received the Final Settlement Statement that showed over \$250,000 less in seller's proceeds than what was shown on the statement Mrs. Iwamoto had signed on November 5, 2004; and
- (e) ordering escrow to disburse all proceeds the following day (thus allowing them to receive alleged loan repayments with interest as well as their commission), without reviewing the Final Settlement Statement with Mrs. Iwamoto.

The evidence cannot be disputed that the Benches favored their own interests as creditors over their client's interest as a seller. Thus, for example, the Benches gave Hironaga two mortgages for him to have Mrs. Iwamoto sign, but both mortgages falsely stated that Mrs. Iwamoto had signed a promissory note agreeing to repay the mortgage amounts with an (unstated) amount of interest. In fact, Mr. and Mrs. Bench filled out written statements instructing escrow to pay them \$60,000 with 7% interest from April 1, 2004 (apparently a first mortgage payoff) and another \$65,000 with 7% interest from April 1, 2004 (apparently a second mortgage payoff, even though the second mortgage was dated as of May 21, 2004!). *See* Exs. 38 and 39. These amounts -- the mortgages with interest -- did not appear in the estimated settlement statement that Mrs. Iwamoto signed, but only in the Final Settlement Statement that the Benches “approved” on her behalf.

Similarly, the Benches -- because they were in it “up to [their] necks” as Mr. Bench admitted, asked no questions about why Hironaga was continuing to ask for money, ignoring red flags that should have raised concerns about whether the money was for Mrs. Iwamoto's benefit. For example, they certainly knew by the opening of escrow in October 2004 (when they received the preliminary title report) that Hironaga had used his power of attorney to give Drader a \$188,000 mortgage and Murphy a \$93,000 mortgage. Yet, when Hironaga asked them for \$50,000 more during escrow, they asked no questions, but paid the money because they did want to impede closing. Incredibly, they even ignored the fact that Hironaga's “security” for the \$50,000

would come, not from the Hoalii Place property, but from the Kuamu street property, which they knew Hironaga and Lemkau (another client of theirs) were involved with, but with which Mrs. Iwamoto had no connection. In addition, when they received -- what must have been shocking news -- on December 1, 2004, that instead of \$93,000 as stated in a July mortgage, Murphy would now be paid \$207,000 (a \$104,000 increase) and that instead of \$188,000 for another July mortgage, Drader would now be paid \$312,000 (a \$124,000 increase), they did nothing to ensure that Mrs. Iwamoto understood that the seller's proceeds would now be reduced by \$228,000. Instead, they responded by instructing escrow to record closing. These actions clearly fell below the standard of care for real estate agents in Hawaii. See Ex. 37 at pp. 6-10.

C. The Benches Breached Their Fiduciary Duties Owed to Mrs. Iwamoto.

Property House, 68 Haw. at 377, 715 P.2d at 810, states that “[t]he law imposes upon a real estate broker a fiduciary obligation comprised of the utmost good faith, integrity, honesty and loyalty.” A real estate broker, as a fiduciary, is thus obligated to put his or her principal's interests first. Thus, a “real estate agent bears a duty to make a full, fair, and timely disclosure to the principal of all facts within the agent's knowledge which are, or may be, material to the transaction and which might affect the principal's rights and interests or influence his actions.” *Id.*

Here, the Bench Defendants knew that Mrs. Iwamoto was their client, but took no steps to make **full, fair and timely** disclosure of all facts within their knowledge that might have been material to the sale of the Hoalii Place property. Among the facts that they did not disclose are the following:

- their mortgages were not secured by promissory notes though they had represented they were;
- they loaned Hironaga \$50,000 even though they knew that Hironaga was giving another property as security.
- they were taking an additional \$10,000 from escrow that was not reflected on the Estimated Settlement Statement, thus reducing the seller's proceeds;
- because they were exposed as creditors, they needed the transaction to close and had demanded (on Mrs. Iwamoto's behalf) that closing be done by December 1, 2009;
- after the estimated settlement statement, Drader was demanding \$124,000 more from escrow than her “mortgage” amount, reducing the seller's proceeds accordingly;
- after the estimated settlement statement, Murphy was demanding \$104,000 more from escrow than his “mortgage” amount, reducing the seller's proceeds accordingly;
- they were demanding to be paid off for their two “mortgages” from April 1, 2004 with interest; and
- there was a Final Settlement Statement that showed a reduction in the seller's proceeds of more than \$250,000.

For the Benches to claim under these facts that they breached no fiduciary duties owed to Mrs. Iwamoto is absurd. They clearly understood that she was the seller. Thus, they purportedly required that she (not Hironaga) sign the sales contract and the seller's disclosure statement. This makes sense because they knew that Hironaga was involved not only with her property but also with the property of their other client -- Lemkau -- and that Hironaga was willing to interchange the two properties. Under the law, they had a specific duty to inform Mrs. Iwamoto that their relationship with Hironaga involved not merely her property, but also the Kuamu Street property. See 12 C.J.S. *Brokers* §119 at 137 (2004) (real estate broker must disclose to his/her principal “any relationship he or she has with any other party to the transaction”). Yet, under these facts, they made absolutely no effort to meet with Mrs. Iwamoto, their client, and go over any sales documents with her. Instead, their focus was on closing the sale

and getting paid. As a result they left Mrs. Iwamoto, an unsophisticated **elderly** woman caring for her disabled son, with no idea of what was happening, allowing Hironaga and themselves to profit, while she saw not a penny.

D. The Benches Were Unjustly Enriched.

In *Durette v. Aloha Plastics Recycling, Inc.*, 105 Hawai'i 490, 502, 100 P.3d 60, 72 (2004), the Hawaii Supreme Court explained that "[o]ne who receives a benefit is of course enriched, and he would be unjustly enriched if its retention would be unjust." Thus, an unjust enrichment claim exists where there is "the unjust enrichment of one person at the expense of another." *Id.* at n. 9 (quoting *Small v. Badenhop*, 67 Haw. 626, 636 n.12, 701 P.2d 647, 654 n.12 (1985)).

Here, the Benches benefitted at the expense of Mrs. Iwamoto. Based on the Final Settlement Statement, their commission and the other payments from escrow, the Benches realized \$220,821.02.¹⁵ Mrs. Iwamoto realized \$0. If the sale had not closed, the Benches would have gotten no money as well. Indeed, the Benches were apparently so pleased with the outcome that they continued to lend money to Hironaga, taking mortgages on properties that Hironaga and Lemkau's company, H & L Developments, Inc., tried to develop. *See* Exs. 40 & 41.

The Benches gave Hironaga money and at the same time made sure that the sale swiftly closed so that they would get repaid with interest and a commission. In doing so, they did nothing to ensure that their client understood what was happening, how the seller's proceeds were diminishing, or where these proceeds were going. Under these circumstances, the Benches clearly benefitted at Mrs. Iwamoto's expense.

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Bench Defendants' Motion for Summary Judgment be DENIED.

DATED: Honolulu, Hawai'i, November 2, 2009.

LOUISE K.

THOMAS E. BUSH

Attorneys for Plaintiff TSUTAE IWAMOTO

Footnotes

¹ The dates of these checks are significant because most were written and cashed by Hironaga and others before the Hoalii Place property, discussed *infra* had been purchased and all were written and cashed before Hironaga obtained a building permit for the Hoalii Place property. *See* Ex. 9. The Bench Defendants have submitted an improper declaration from Hironaga in which he claims, without a shred of supportive documentation, that he borrowed money from the Benches to finish building a house on the Hoalii Place property. While Plaintiff objects to this declaration obtained only after Hironaga successfully avoided a deposition wherein his lies could be exposed, in fact, Hironaga took money for himself and for others (including Tanida) from Mrs. Iwamoto's account before the Hoalii Place property had been purchased and any building permit obtained. Meanwhile, building department documents show that the reported value of the construction on Hoalii Place was nearly equal to the amounts available from the New Century Mortgage proceeds placed in Mrs. Iwamoto's bank account, together with Mrs. Iwamoto's IRA proceeds and revolving VISA to which Hironaga had access. *See* Ex. 9. For the Bench Defendants to claim that they helped out Mrs. Iwamoto by lending Hironaga money is untrue. They simply facilitated his continued **exploitation** of her and joined in this **financial exploitation** themselves.

² Helen's legal name is Yu Neu, but she goes by Helen.

3 Mr. Bench sought to explain this misstatement by claiming that he asked Mrs. Iwamoto to visit the lot and she had refused because she trusted Hironaga. Id. at 29:21-30:4.

4 The Benches claim that the seller went over the contract with Mrs. Iwamoto, a claim that Mrs. Iwamoto disputes. See T. Iwamoto decl. at ¶ 19.

5 Mrs. Iwamoto disputes that she ever saw a \$10,000 check or that she knowingly signed the "Receipt and Promise to Pay." Interestingly, the Benches produced two versions of this Receipt and Promise to Pay. One version has only Hironaga's signature. See Ex. 14. The other version has a different signature of Hironaga and bears Mrs. Iwamoto's signature. See Ex. 13. Mrs. Iwamoto recalls that Hironaga requested, and she agreed, to sign some blank pages, which he claimed he needed. See T. Iwamoto Decl. at ¶20. In their Motion, the Benches have also attached as their exhibit 7 a copy of a \$50,000 check made payable to Mrs. Iwamoto, which they assert they provided to Hironaga. Mrs. Iwamoto disputes that she ever saw this check or was told anything about it, and has pointed out that while her signature appears on a xeroxed page below the copy of the check, the writing "Received 3/31/04" is *not* her writing. See T. Iwamoto Decl. at ¶20.

6 The Benches are apparently relying on the declaration from Glen Hironaga attached to their motion. However, as discussed *infra*, this declaration should not be considered given that Hironaga has evaded his deposition, thus denying Plaintiff the opportunity to examine him, and, in any event, his self-serving, unsupported testimony is contradicted by documents and other evidence as set forth below.

7 Plaintiff subpoenaed records from Y.S. Construction and has sought to take the 30(b)(6) deposition of its representative, but the company has simply failed to respond, requiring Plaintiff to move to hold the company in contempt.

8 DPP records show that someone named "Randy Hirata" applied for a building permit for 92-1375 Kuamu Street in May 2004. See Ex. 18. Mr. Hirata is one of the people that Hironaga paid money to out of Mrs. Iwamoto's bank account! See Ex. 8 at 074597.

9 Interestingly, the Benches hired attorney Thomas M. Rosenberg to prepare a "Promissory Note and Mortgage" and received a receipt from him addressed to "Mr. Tsutae Iwamoto" at "92-267 Hoalii Place". See Ex. 23. Mrs. Iwamoto -- who the Benches knew continued to reside at her Manoa home -- never saw this bill (see T. Iwamoto Decl. at ¶ 23), which the Benches apparently kept in their files.

10 Kimberly Lemkau is Todd Lemkau's wife who at the time she was deposed stated that she had filed for divorce from Mr. Lemkau. See Ex. 31, K. Lemkau depo at 7:12-17.

11 Bench Mark Realty is a dba for Helen Bench Realty.

12 When she was at escrow on November 5, 2004, Mrs. Iwamoto did allow escrow to direct seller's proceeds to Hironaga as she understood from him that he needed to pay contractors and suppliers. She was never told after this that much of this money would instead be going to the Benches, Murphy and Drader. See T. Iwamoto Decl. at ¶ 31.

13 The Benches admitted in their depositions that they believed Mrs. Iwamoto was signing the contract documents. Clearly, they did not view the forgeries as an attempt by Hironaga to use his power of attorney.

14 While Helen Bench has claimed that she continually called Mrs. Iwamoto on the phone, Mrs. Iwamoto strenuously denies this, see T. Iwamoto Decl. at 30, and there is not one shred of documentation to corroborate Mrs. Benches' assertions.

15 The Benches received \$220,821.02 as follows: \$62,819.18 (first mortgage, ex. 30 at S00023) \$68,054.11 (second mortgage, ex. 30 at S00022)) \$50,000 (ex. 30 at s00020) \$10,000 (ex. 30 at S00020) \$29,947.73 (realtor commission, ex. 30 at S00019).